II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 16 June 2004

on the measures implemented by Spain for Siderúrgica Añón SA

(notified under document number C(2004) 1813)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2005/827/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above [1], and having regard to their comments,

Whereas:

I. PROCEDURE

(1) Following press reports that a new company, Siderúrgica Añón SA (hereinafter Siderúrgica Añón), had obtained a loan of EUR 9,62 million, with the backing of the regional government of Galicia, to finance the installation of a rolling mill, the Commission requested information on that measure by letter of 14 May 2001. By letter of 2 July 2001, the Commission sent a reminder of that request.

(2) By letter of 10 July 2001, the Spanish authorities informed the Commission of the existence of the loan and of a guarantee granted by the Galician Institute for Economic Development (IGAPE).

(3) By letter of 27 July 2001, the Commission requested further information on the terms of the loan and the guarantee.

(4) Following two reminders dated 19 September and 12 October 2001, the Spanish authorities provided the information requested by letter of 25 October 2001, supplemented by letter of 12 November 2001.

(5) By letter dated 20 December 2001, the Commission notified Spain of its decision to initiate proceedings under Article 6(5) of Commission Decision No 2496/96/ECSC of 18 December 1996 establishing Community rules for state aid to the steel industry [2] (hereinafter the Steel Aid Code) in respect of the measures.

(6) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* [3]. The Commission invited interested parties to submit their comments on the measures. At the same time the Commission issued an information injunction requesting certain information.

(7) By letter dated 1 March 2002, the Spanish authorities submitted their comments and provided some of the information requested. The missing information was submitted by letter dated 19 April 2002 and supplemented by letter dated 7 May 2002.

(8) The Commission received comments from interested parties. It forwarded them to Spain, which was given the opportunity to react; its comments were received by letters dated 26 March 2002.

[1] OJ C 33, 6.2.2002, p. 9 and OJ C 223, 19.9.2002, p. 2.

[2] OJ L 338, 28.12.1996, p. 42.

[3] OJ C 33, 6.2.2002, p. 9.

(9) Following the information provided by Spain, the Commission decided on 2 July 2002 to extend to other measures the procedure already initiated against the loan and guarantee referred to in recital (2).

(10) By letter dated 9 August 2002, the Spanish authorities submitted their comments.

(11) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* ([4]). The Commission invited interested parties to submit their comments on those measures.

(12) The Commission received comments from interested parties. It forwarded them to Spain, which was given the opportunity to react.

II. **FACTS**

1. **The recipient**

(13) Siderúrgica Añón is a company created in January 2000 for the production and sale of steel products. It started production tests in March 2002. When it was created, its share capital amounted to EUR 3 004 800 and was subscribed by Hierros Añón SA (hereinafter Hierros Añón) (66,66 %) and Rodonita SL (hereinafter Rodonita) (33,33 %).

(14) Hierros Añón is a company dedicated to the sale of steel products. Through its subsidiary Gallega de Mallas SL (hereinafter Gallega de Mallas), it also produces welded steel mesh.

(15) The following table shows the relevant figures for the group:

	1999			2000		
	Employees	Turnover (EUR million)	Balance sheet (EUR million)	Employees	Turnover (EUR million)	Balance sheet (EUR million)
Gallega de Mallas	22	15,2	9,9	22	18,4	9,9
Hierros Añón	NA	18,0	9,8	20	22,5	15,4
Promociones Añón	0	0,0	0,2	0	0,0	0,2
Siderúrgica Añón	0	0,0	0,0	0	0,0	12,0
Total		33,2	19,9	42	40,9	37,5

(16) Rodonita is a company belonging to the Epifanio Campo SL group (hereinafter Epifanio Campo) which is mainly active in the industrial materials sector.

(17) The following table shows the relevant figures of the companies in which Rodonita holds more than a 25 % stake:

	1999			2000		
	Employees	Turnover (EUR million)	Balance sheet (EUR million)	Employees	Turnover (EUR million)	Balance sheet (EUR million)
Pretensados Campo	20	1,99	1,86	19	1,52	2,41
Campo Brick	37	1,12	12,61	26	3,93	13,89
Epifanio Campo	26	6,16	11,92	27	12,21	17,69
Nueva Cerámica Campo	35	4,20	6,93	32	4,34	6,22
A Ostreira	7	0,17	0,86	7	0,26	0,90
Cerámica Campor Saez	25	0,87	0,74	29	1,48	0,80
Siderúrgica Añón	0	0,0	0,0	0	0,0	12,0
Total	150	14,51	34,93	140	23,74	53,94

([4]) OJ C 223, 19.9.2002, p. 2.

(18) According to the Spanish authorities, the main objectives of Hierros Añón and Rodonita with this investment are: (a) to cover their needs in steel products so as not to depend on external sources as they have done until now; (b) to achieve uniform quality in their products; (c) to increase the value added within the groups. It is planned that 70 % of Siderúrgica Añón's production will be directed to the companies belonging to those groups while the rest will be exported outside the Community (mainly North Africa and Latin America, but possibly Asia too). That percentage will be lower when the second phase of the project is finished.

(19) Total investment costs for the project initially amounted to EUR 29 992 589. They were to be financed through own resources, public aid and loans.

2. **The market**

(20) The company will produce its finished products (concrete reinforcing bars in bars or coils) from steel billets purchased in the open market. Concrete reinforcing bars are a low value added product used in the building sector.

(21) Although substantial capacity reductions took place in the years 1995 to 1997 (for example, production capacity was reduced by 3,4 million tonnes per year in Italy), the sector in which Siderúrgica Añón is active suffers from overcapacity, as is shown in the following tables:

Straight concrete reinforcing bars	Community production (million tonnes)	Community capacity (million tonnes)	Utilisation rate (%)
1997	11,8	19,5	60,2
1998	12,0	18,2	65,6
1999	12,0	17,6	68,5
2000	12,5	17,5	71,4

Source: Reports on investments in the Community coal and steel industries. Office for Official Publications of the European Communities.

Coiled concrete reinforcing bars	Community production (million tonnes)	Community capacity (million tonnes)	Utilisation rate (%)
1997	2,0	2,8	70,6
1998	1,7	2,8	60,2
1999	2,2	2,8	77,1
2000	3,0	3,7	80,5

Source: Reports on investments in the Community coal and steel industries. Office for Official Publications of the European Communities.

(22) In 1999 Spain exported about 480 000 tonnes of these products to the rest of the EU. It imported about 290 000 tonnes from the rest of the Community.

(23) Concrete reinforcing bars are produced throughout the Community except in Ireland, Sweden and Finland.

3. **Description of the measures**

(24) On 10 November 2000 the Galician regional government, through IGAPE, awarded Siderúrgica Añón a grant of EUR 2 399 407 representing 8 % of the eligible costs (of which EUR 285 681 was paid up until 31 July 2002). IGAPE was created in 1993 and acts as a channel for the activities of the Galician regional government to stimulate the Galician economy.

(25) On 29 December 2000 the Spanish Ministry of Science and Technology granted an interest-free loan of EUR 1 803 036 with a maturity of 15 years and a five-year grace period.

(26) On 2 April 2001 Siderúrgica Añón contracted a syndicated loan of EUR 9 616 193 with seven banks under the cover of a broader agreement between the Galician regional government and those banks, the so-called Inversiones Estratégicas de Galicia (INESGA) facility ([5]). The interest rate is Euribor three months + 25 basis points and a one-off formalisation fee of 0,5 %. The repayment of 30 % of this loan is covered by IGAPE's subsidiary guarantee. For this guarantee, the company pays a premium equivalent to 0,2 % of the amount guaranteed. IGAPE had also agreed on 1 February 2001 to subsidise 25 basis points of the interest rate as well as the formalisation fee for the loan.

(27) On 19 April 2001 Siderúrgica Añón's share capital was increased to EUR 10 217 220. The publicly controlled company SODIGA Galicia SCR, SA (hereinafter SODIGA), provided EUR 1 803 060 (the actual contribution amounted however only to a share value of EUR 1 202 040 as the price of EUR 60 per share to be paid was increased by a premium of EUR 30), Hierros Añón EUR 4 006 860 and Rodonita EUR 2 003 520. The private partners paid EUR 60 per share, half of which was paid immediately, with the other half to be paid before the end of September 2001. After this increase in capital, Siderúrgica Añón's capital was held as follows: Hierros Añón 58,82 %; Rodonita 29,41 %; SODIGA 11,76 %. The parties also signed an agreement whereby Hierros Añón and Rodonita (or Siderúrgica Añón itself) promised SODIGA to buy SODIGA's stake by no later than 19 April 2007 for the higher of the following two amounts: (a) the theoretical accounting value of the firm, as determined, if necessary, by independent expertise; or (b) 141,85 % of the initial contribution, i.e. EUR 2 557 640,61. SODIGA will receive from Siderúrgica Añón as from 30 December 2002 five annual instalments of EUR 150 916 as an advance payment against the final amount.

(28) SODIGA is a risk capital company controlled by the Galician regional government and dedicated to acquiring temporary stakes in undertakings related to the development of Galicia's economy and industry. SODIGA's shareholders are: the Galician regional government (20,6 % directly and 46,6 % through IGAPE) and financial institutions (32,8 %). SODIGA receives grants from IGAPE which up to 2000 amounted to EUR 6 861 574,89. These grants must be used in the financing of special investments, i.e. investments riskier than those normally financed by the company or with longer maturities or amortisation periods or investments in certain geographical areas.

(29) On 1 March 2002 Siderúrgica Añón's share capital was increased by a further EUR 4 207 140. The three shareholders subscribed according to their stakes (SODIGA contributed EUR 495 180) and on the same terms for all three shareholders as to price per share and payment. The parties also signed an agreement whereby Hierros Añón and Rodonita (or Siderúrgica Añón itself) promised SODIGA to buy SODIGA's stake by no later than 19 April 2007 for the higher of the following two amounts: (a) the theoretical accounting value of the firm, as determined, if necessary, by an independent expertise; or (b) 133,82 % of the initial contribution, i.e. EUR 662 650. SODIGA will receive from Siderúrgica Añón as from 30 December 2003 four annual instalments of EUR 41 867 as an advance payment against the final amount.

4. **Grounds for initiating the procedure**

(30) In its decisions initiating proceedings, the Commission expressed its doubts whether the stake acquired by SODIGA in the share capital of Siderúrgica Añón could be regarded as a genuine provision of risk capital according to usual investment practice in a market economy and whether the price paid for the guarantee was a market price. Moreover, the Commission expressed its doubts as to the compatibility with the common market of those measures as well as the other measures adopted by the Spanish authorities for financing the investment, listed in the previous section.

III. **COMMENTS FROM INTERESTED PARTIES**

(31) In their letter of 22 February 2002, the European Independent Steelworks Association (EISA) considered that the aid was incompatible with the common market mainly because (a) the market for steel bars was suffering from overcapacity, (b) the investment would never be profitable and would lead only to distortions of competition and (c) no private investor would risk capital in current market conditions for the production of these products.

([5]) INESGA is a development fund dedicated to facilitating the financing of viable projects with special interest for the Galician economy, through agreements with financial institutions. On 29 May 2000, the Galician regional government and seven banks signed an agreement whereby these banks undertook to contribute up to EUR 108,2 million for the financing of investment projects. Under the terms of the agreement, any participating bank can refuse to contribute to the financing of any given project.

(32) In their letter of 5 March 2002, the Unión de Empresas Siderúrgicas (UNESID) considered it illogical that public funds should be used to build new capacities in a sector where substantial amounts of public funds had been devoted to reducing the workforce and capacities.

(33) In their letter of 8 March 2002, Federacciai, the federation of Italian steel companies, argued that the market for steel bars was suffering from overcapacity and that investments in the sector therefore involved high risk and could hardly be expected to be profitable. Moreover, it considered that the involvement of SODIGA and INESGA was prompted by political considerations. Finally, the interest rate of the loan granted through INESGA and the premium paid for the guarantee did not correspond to market conditions.

(34) In their letter of 17 October 2002, UK Steel Enterprise Ltd. (hereinafter UK Steel) submitted that overcapacity, excessive third-country competition and low prices were the features of this sector and all indicated that a normal private investor would not have contributed capital towards the creation of new capacity. It should be questioned whether Hierros Añón and Rodonita themselves would have invested in this project had it not been for the availability of illegal state aid. Furthermore, the fact that Hierros Añón and Rodonita were to use 70 % of the output for their own internal purposes had to put a question mark over the likely profitability of Siderúrgica Añón. Transfer pricing of the product would be untransparent and would presumably be geared more towards maximising the downstream profitability of Hierros Añón and Rodonita than that of Siderúrgica Añón.

(35) By letter dated 31 July 2002, Siderúrgica Añón made the following submissions:

(36) According to the company, as from 23 July 2002, Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to state aid to small and medium sized enterprises ([6]) (hereinafter the SME Regulation), applied to the steel sector. The fact that the aid was granted before the expiry of the ECSC Treaty was of no consequence since according to settled case-law, Commission decisions on compatibility of aid had to be based on the elements of fact and law existing at the moment when the decision was adopted and not at the moment when the aid was granted. Moreover, the Commission notice on the determination of the applicable rules for the assessment of unlawful state aid ([7]), to which the communication from the Commission concerning certain aspects of the treatment of competition cases resulting from the expiry of the ECSC Treaty ([8]) referred, mentioned only frameworks, guidelines, communications and notices but not regulations.

(37) In these circumstances, since Siderúrgica Añón was an SME and the intensity of the aid granted ([9]) was lower than the intensity mentioned in Article 4 of the SME Regulation, the aid was compatible with the common market (and exempted from the notification obligation).

(38) Moreover, as to the grant awarded by IGAPE and the interest-free loan granted by the Ministry of Science and Technology, the company argued that they were granted under schemes approved by the Commission on 5 July 1995 (state aid N 21/95) and 18 May 2001 (state aid N 182/01) respectively and were therefore compatible with the common market.

(39) As to the stake acquired by SODIGA in the capital of Siderúrgica Añón, the company claimed that the fact that the interests of the private and public shareholders might be different was of no relevance since the essential factor was that the private and public investors participated on the same terms and conditions. To support this position the company contended that the Commission had considered that there was no state aid involved in the stake acquired by Bavaria in the capital of NMH along with three other steel producers (Decision of 26 July 1988, mentioned in the Commission Decision of 31 October 1995) and that when it initiated proceedings against the stake acquired by the Walloon Region in Carsid, the Commission did not take into account the different interests of the private and public shareholders.

(40) In its letter of 30 September 2002, the company argued that, since the three-month period established in Article 6(5) of the Steel Aid Code for adopting a decision had elapsed, the Commission was no longer entitled to adopt a decision on the measures referred to in its letter of 20 December 2001.

([6]) OJ L 10, 13.1.2001, p. 33. Regulation as amended by Regulation (EC) No 364/2004 (OJ L 63, 28.2.2004, p. 22).

([7]) OJ C 119, 22.5.2002, p. 22.

([8]) OJ C 152, 26.6.2002, p. 5.

([9]) Grant provided by IGAPE, gge: 0,95 %; interest-free loan by Ministry of Science and Technology, gge: 2,8 %; loan granted through INESGA, gge: 2,32 %; guarantee granted by IGAPE, gge: 0,63 %; subsidisation by IGAPE of the loan granted by INESGA, gge: 0,32 %; subsidisation by IGAPE of the formalisation fee, gge: 0,16 %.

(41) By letter dated 23 June 2003, Siderúrgica Añón submitted further comments. Firstly, it claimed that the aid could not be analysed in the light of the ECSC Treaty or the Steel Aid Code. Secondly, it maintained that the aid fell within the scope of the SME Regulation. Thirdly, it argued that the aid was existing aid within the meaning of Article 1(b) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([10]) (hereinafter the Procedural Regulation) because it was granted before the entry into force for the steel sector of the state aid rules of the EC Treaty.

IV. **COMMENTS FROM SPAIN**

(42) As regards the acquisition by SODIGA of a stake in the share capital of Siderúrgica Añón, the Spanish authorities argued that this was done following normal practice in a market economy. Investment decisions were taken considering only the viability of the projects and the expected profitability. In the present case, SODIGA's stake in Siderúrgica Añón was acquired at the time of the increase in capital and simultaneously with the existing shareholders which, together, subscribed to 83,4 % of the new shares. In these circumstances, the Spanish authorities maintained that, according to the case-law, it fulfilled the private investor criteria. Moreover, the Spanish authorities claimed that, through the repurchase agreement, SODIGA ensured a minimum return on the investment of 7,2 % per year, which was higher than the interest on 10-year Treasury bonds at the time the contract was signed (5,3 %). In any case, if state aid was involved it would be compatible with the common market according to point VIII.3 (ii) of the information from the Commission on state aid and risk capital ([11]) because it involved a medium-sized enterprise in its start-up stage in an assisted area.

(43) As to the fact that SODIGA paid a higher price per share and disbursed it immediately, the Spanish authorities maintained that this compensated for the minimum return on investment granted to SODIGA, from which the other shareholders did not benefit. In any case, they maintained that it was only normal practice that a new shareholder should pay a higher price for the newly issued shares, reflecting the substantial impetus imparted to the project by the original shareholders (for example in contracts with suppliers of equipment and in the acquisition of land).

(44) As for SODIGA's participation in the second increase in the capital of Siderúrgica Añón, the Spanish authorities argued that SODIGA participated in proportion to its holding and on the same terms and conditions as the other shareholders. In these circumstances there was no state aid.

(45) Concerning the imputability of the actions of SODIGA to the public authorities, the Spanish authorities contended that, according to the case-law, the Commission had to provide evidence that they intervened in the decision to invest in Siderúrgica Añón.

(46) With regard to the loan granted through INESGA, the Spanish authorities maintained that the funds came exclusively from private sources (the participating banks), that those banks were free to participate in the financing of any operation and that INESGA's involvement was limited to the follow-up. In this sense, they concluded that no public funds were involved. Moreover, they maintained that the comparison with the reference rate used by the Commission was not appropriate since that reference rate corresponded to the average of the five-year interbank swap rates for the months of September, October and November 2000 increased by 75 percentage points. Since the five-year interbank swap rate at the date of granting the loan was 4,769 %, the corrected reference rate should be 5,519 %. Finally, they contended that the interest rate was similar to, or even higher than, other loans granted to companies belonging to the Añón group.

(47) On the guarantee given by IGAPE, the Spanish authorities claimed that it was in line with market conditions. They contended that the commission applied by private banks to these types of projects amounted to 0,15 % per quarter. The difference with the commission applied in the present transaction stemmed from the following factors: (a) the conditions for calling on the guarantee were much stricter than those of the bank guarantees, since these were enforceable at first request and IGAPE's guarantee was enforceable only in a subsidiary capacity (once the beneficiary was declared insolvent); (b) the risk assumed by IGAPE was very low since it covered only 30 % of the loan and the loan financed only 40 % of the investment; and (c) the project was promoted by groups known for their solvency.

(48) The Spanish authorities provided statements from two banks (Caixa Galicia and Banco Pastor) to the effect that, in view of the conditions of the loan and the identity of the shareholders, they would have applied a commission of 0,20 % per year for such guarantee.

([10]) OJ L 83, 27.3.1999, p. 1. Regulation as amended by the 2003 Act of Accession.
([11]) OJ C 235, 21.8.2001, p. 3.

(49) As regards the IGAPE subsidy of 0,25 % and the formalisation fee, the Spanish authorities maintained that this aid was granted under schemes approved by the Commission, and that, except for EUR 14 299,44, it fell within the scope of Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid ([12]), which applied also to the ECSC sector. They also contended that the market for those products would not be affected since the majority of the products would be used within the group and almost all the rest would be exported outside the EEA.

(50) As to the grant provided by IGAPE, the Spanish authorities argued that it was awarded under a scheme approved by the Commission and was therefore compatible with the common market.

(51) In any event, the Spanish authorities maintained that the aid was compatible with the common market because it fell within the scope of the SME Regulation, which applied also to the ECSC steel sector.

(52) They also affirmed that the aid was in line with the Community guidelines on state aid for environmental protection ([13]). They contended that the system chosen for water treatment would improve on environmental protection as compared with the traditional system and that it represented an additional cost of EUR 661 113. Similarly, the use of natural gas in the reheating furnace would drastically reduce emissions as compared with fuel oil and represented an additional cost of EUR 1 502 530. Thirdly, the fact that all the civil works for the hydraulic installations, the lubricating installations, the cabling and the pipelining had been carried out on the surface instead of being made underground would improve working conditions and prevent underground leaks and represented an additional cost of EUR 6 911 639.

(53) As for the comments made by third parties (see recitals 31 to 34), the Spanish authorities stated that they were not supported by any factual evidence, and that the associations were only trying to prevent the entry into the market of a new company. In this context, the Spanish authorities recalled that it was the difficulties of obtaining supplies of these products from the traditional producers (mainly undue delay in honouring deliveries) that had prompted the promoters of the new company to carry out the investment. They also drew the Commission's attention to Commission Decision 89/515/EEC of 2 August 1989 relating to a proceeding under Article 85 of the EEC Treaty ([14]) and the related judgments of the Community lawcourts whereby it was found that some of the members of EISA had taken part in anti-competitive practices.

V. **ASSESSMENT OF THE MEASURES**

(54) Siderúrgica Añón manufactures steel bars and rods, which are products included in Annex I to the ECSC Treaty. It is therefore an undertaking within the meaning of Article 80 of that Treaty.

(55) In the present case, it is evident that Spain unlawfully implemented the measures since it did not follow the procedures laid down in Article 6 of the Steel Aid Code. The Commission therefore cannot accept the argument put forward by the company (see recital 41) that the aid was existing aid.

(56) Even though the procedure was initiated under the ECSC Treaty, the Commission could not adopt a final decision before 23 July 2002 since the decision extending the procedure was adopted on 2 July 2002 and sent to the Spanish authorities on 4 July 2002. The notice of invitation to submit comments was published on 9 September 2002. In point 43 of its communication concerning certain aspects of the treatment of competition cases resulting from the expiry of the ECSC Treaty, the Commission stated that, in such cases, it would continue the investigation under the provisions of the Procedural Regulation and adopt a final decision under Article 88(2) of the EC Treaty.

(57) The Commission cannot accept the company's argument that the expiry of the three-month period since the initial decision initiating the procedure prevented it from adopting a decision (see recital 40). As the Court of Justice ruled in its judgment of 12 December 2002 in Case C-5/01 Kingdom of Belgium *v* Commission of the European Communities ([15]), 'the three-month period set out in Article 6(5) of the sixth steel aid code cannot be regarded as a prescription period linked to loss of competence'. At present, the Procedural Regulation is fully applicable and Article 7(6) thereof has been complied with.

([12]) OJ L 10, 13.1.2001, p. 30.
([13]) OJ C 37, 3.2.2001, p. 3.
([14]) OJ L 260, 6.9.1989, p. 1.
([15]) [2002] ECR I-11991, paragraph 60.

1. **Existence of state aid**

(58) According to Article 87(1) of the EC Treaty, any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market.

(a) *The acquisition by SODIGA of a stake in the share capital of Siderúrgica Añón*

(59) As to the acquisition by SODIGA of a stake in the share capital of Siderúrgica Añón (see recitals 27 and 29) the Commission notes, in the first place, that SODIGA is controlled by the Galician regional government. The Commission also notes that the Galician regional government considers that it forms part of IGAPE's programmes for the support of undertakings ([16]). In these circumstances the Commission considers that SODIGA's actions are imputable to the State.

(60) In order to decide whether an advantage is conferred on the beneficiary of the measure, the Commission applies the market economy investor principle. This principle has been applied by the Commission in many cases and has been accepted and developed by the Court in several judgments ([17]). The essence of this principle is that when a public authority invests in a company on terms and in conditions which would be acceptable to a private investor operating under normal market economy conditions, the investment is not state aid.

(61) In principle, where in a given transaction a private investor and a public investor take part, there is no state aid if the private and the public investor participate on the same terms and conditions.

([16]) Source http://www.xunta.es/Galicia2001/G200112G.pdf

([17]) See the Judgment of the Court of 10 July 1986 in Case 234/84 Kingdom of Belgium v Commission of the European Communities (Boch) [1986] ECR 2263, paragraph 14: 'An appropriate way of establishing whether such a measure is a state aid is to apply the criterion which was mentioned in the Commission's decision and, moreover, was not contested by the Belgian Government, of determining to what extent the undertaking would be able to obtain the sums in question on the private capital markets. In the case of an undertaking whose capital is held by the public authorities, the test is, in particular, whether in similar circumstances a private shareholder, having regard to the foreseeability of obtaining a return and leaving aside all social, regional-policy and sectoral considerations, would have subscribed the capital in question'. See also the Judgment of the Court of First Instance of 6 March 2003 in Joined Cases T-228/99 and T-233/99 Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission of the European Communities [2003] ECR II-435, paragraphs 255, 266, 313 and 324.

(62) This is not the case, however, of the acquisition by SODIGA of a stake in the capital of Siderúrgica Añón, for the following reasons:

(63) Firstly, in the first increase in capital, SODIGA paid for its stake immediately, while the private partners paid for theirs later and SODIGA paid EUR 90 for each of the shares it acquired, while the private partners paid only EUR 60 for theirs.

(64) Secondly, the main beneficiaries of Siderúrgica Añón's production will be the private partners, who can make profits out of these inputs while SODIGA can only count on the profitability of Siderúrgica Añón in order to obtain a return on its investment.

(65) The Commission cannot accept the argument that the premium paid by SODIGA is normal practice (see recital 43) since the company had not yet started production and was not therefore capable of showing a particularly good performance record which could justify a premium. Furthermore, if the argument was accepted, it would have to be applied to the capital injections made by all the investors at that time.

(66) The Commission notes, however, that by virtue of the agreement for the buy-back of the shares, SODIGA ensured a return on investment of 7,2 % which the private shareholders did not have ([18]).

(67) The Commission considers that, taking into account the fact that annual instalments are going to be paid, SODIGA's stake is a minority one which does not allow it any influence over the management of the company and that Siderúrgica Añón will produce mainly for its own shareholders, from an economic point of view this stake can be treated as a subordinated participating loan. From the standpoint of the risk involved, however, this investment has to be treated as normal share capital since although subordinated participating loans are ranked below other debt instruments they take priority over share capital.

([18]) Although the possibility cannot be ruled out that the final price could be higher if the alternative method (theoretical accounting value) was used, according to the latest projections made by SODIGA in February 2002, the use of this theoretical accounting value would yield a return on investment of 6,3 %.

(68) The question is therefore whether the abovementioned return on investment of 7,2 % would cover the risk involved and be acceptable for a private investor granting a subordinated participating loan. The Commission, following the approach adopted in Decision 2003/284/EC of 11 December 2002 on the state aid implemented by Spain for Sniace SA [19], considers that the normal interest rate to cover the risk involved would have been 12,33 % for the first increase in capital and 11,06 % for the second. This corresponds to the interbank rate used by the Commission for the calculation of its market reference rate, plus the normal 75 basis points it adds for loans in Spain (6,33 % on 19 April 2001 and 5,06 % on 1 March 2002), plus 600 basis points. These 600 basis points are justified by the absence of any security, the risk involved in the entry of a new company in the steel sector, which suffers from structural overcapacity, and the fact that, as explained earlier, it involves a much higher risk than a normal loan (in case of insolvency, all creditors would have priority) [20]. This is in line with the indications contained in the Commission notice on the method for setting the reference and discount rates [21], which states that the reference rate may be increased by 400 basis points or more in situations involving particular risk (for example, where the security normally required by banks is not provided).

(69) The Commission considers therefore that the acquisition of the stake at issue confers an advantage on Siderúrgica Añón which is financed through state resources.

(70) The aid element in the two stakes is equivalent to the difference in interest rates between 12,33 % and 7,2 %, i.e. 5,13 %, in the case of the first stake and between 11,06 % and 7,2 %, i.e. 3,86 %, in the case of the second stake. Taking into account the instalments being paid by Siderúrgica Añón to SODIGA, this aid then corresponds to the difference between the reimbursements actually being paid and the annual interest payments and reimbursement of the principal that would be due when applying the abovementioned normal interest rates of 12,33 % and 11,06 % respectively. The latter results in yearly interest payments of EUR 222 317,3 due for the first stake and EUR 54 766,9 due for the second. The difference between the appropriate interest payments and the actual reimbursement schedule for the two stakes can be set out as follows [22]:

First stake of EUR 1 803 060 (2001)

Year	2002	2003	2004	2005	2006	2007
Aid-free reimbursement schedule	222 317	222 317	222 317	222 317	222 317	222 317 + 1 803 060 = 2 025 377
Current reimbursement schedule	150 916	150 916	150 916	150 916	150 916	1 803 060
Aid per year	71 401	71 401	71 401	71 401	71 401	222 317

Second stake of EUR 495 180 (2002)

Year	2003	2004	2005	2006	2007
Aid-free reimbursement schedule	54 766	54 766	54 766	54 766	54 766 + 495 180 = 549 946
Current reimbursement schedule	41 868	41 868	41 868	41 868	495 180
Aid per year	12 869	12 869	12 869	12 869	54 766

[19] OJ L 108, 30.4.2003, p. 35.

[20] This approach is also in line with the one taken by the Commission in Decision 2003/284/EC, in which it added 600 basis points to a subordinated loan because of the absence of any security. See recital 42 of the Decision referred to in footnote 19.

[21] OJ C 273, 9.9.1997, p. 3. See in particular the eighth paragraph, first indent.

[22] Concerning the comparison made in the two tables above, account has to be taken of the fact that the actual rate of return on the measures, i.e. 7,2 %, corresponds to a hypothetical annual premium that would also be due in 2007 (the year of reimbursement of the principal) whereas in reality these revenues have been spread over only five (instead of six) and four (instead of five) instalments respectively.

(b) *The loan granted through INESGA*

(71) As regards the loan granted through INESGA (see recital 26), the Commission considers that state aid elements could be involved since the interest rate appears to be rather low. The Commission notes, however, that the funds are provided by private banks which are free to decide whether or not to participate in the loan. In these circumstances, the Commission concludes that the better financial terms are due to IGAPE's intervention (guarantee, interest subsidy paid directly to the banks) and to the fact that it is a syndicated loan. Therefore, no state aid is involved in the loan itself.

(c) *The guarantee granted by IGAPE*

(72) With regard to the guarantee granted by IGAPE (see recital 26), the Commission's practice [23] for assessing individual guarantees includes several conditions for a guarantee not to constitute state aid. In the present case, the Commission notes that Siderúrgica Añón was not in financial difficulty within the meaning of the Community guidelines on state aid for rescuing and restructuring firms in difficulty [24] and has obtained loans on the financial markets without any intervention from the State. It also notes that the guarantee is linked to a specific loan, is for a fixed maximum amount, covers 30 % of the outstanding loan and is not open-ended. Concerning the price paid for the guarantee, the Commission had doubts as to whether the premium paid (0,2 % per year on the outstanding guaranteed debt; no formalisation fee) corresponded to the market price of a similar guarantee taking mainly into account the lists of maximum prices for guarantees published by two of the banks participating in the loan.

(73) The Commission cannot accept as a comparator the 'offers' submitted *ex post* by the two banks (see recital (48)) since they are hypothetical and were made for the purposes of this procedure. In addition, they are those of two banks and do not therefore necessarily represent the market's view.

(74) Neither can the Commission accept the arguments concerning the special features of the guarantee (see recital 47) and therefore the reduction in price on the 'normal' market rate, for the following reasons: (a) the fact that guarantees in Spain are normally enforceable at first request is explained by the demand for further security from the beneficiary. In the present case, however, IGAPE expressly waived its right to require any other security (after having obtained the agreement of the Galician regional government); (b) the fact that the guarantee covers only 30 % of the loan is not relevant since what matters for the guarantor is the amount of the risk; and (c) the fact that the project is promoted by groups known for their solvency is not relevant either, because these groups would not be liable for Siderúrgica Añón's debts.

(75) In these circumstances, the Commission considers that, in this specific case, the market rate for a similar guarantee should be at least that indicated by the Spanish authorities, namely 0,6 % per year (see recital 47).

(76) The Commission considers therefore that the guarantee in question confers an advantage on Siderúrgica Añón which is financed through state resources.

(77) As for the amount of the state aid involved in such guarantee, point 3.2 of the notice on guarantees establishes that the cash grant equivalent for an individual guarantee should be calculated in the same way as the grant equivalent of a soft loan, the interest subsidy representing the difference between the market rate and the rate obtained thanks to the state guarantee after any premiums paid have been deducted. In the present case, in order to determine the market rate of such a loan, and in the absence of other non-guaranteed loans for the financing of the investment, the Commission considers it appropriate to use the interest rate of a non-secured credit facility granted by Caixa de Galicia to Siderúrgica Añón (principal EUR 3 000 000, interest rate Euribor 12 months + 0,75, formalisation fee 0,15 %, maturity one year as from 20 March 2002) [25]. The interest subsidy on the INESGA loan is therefore 0,3 % (the difference of 0,50 % between the risk premium on the INESGA loan (Euribor three months + 0,25 %) and the risk premium on that credit facility (Euribor 12 months + 0,75 %) minus 0,2 % paid for the guarantee). This amounts to EUR 28 848,6 (0,3 % of EUR 9 616 193) p.a.

[23] Commission notice on the application of Articles 87 and 88 of the EC Treaty to state aid in the form of guarantees (OJ C 71, 11.3.2000, p. 14, point 4.2).

[24] OJ C 288, 9.10.1999, p. 2.

[25] Although the life of, and therefore the base rate for, the two loans are different, the Commission considers that the risk premium required by a private creditor for a non-secured loan can constitute a reliable parameter for assessing the aid element involved in the INESGA loan.

(d) *Other measures*

(78) The grant provided by IGAPE (see recital 24), the interest-free loan granted by the Ministry of Science and Technology (see recital 25), the subsidisation by IGAPE of the interest and the formalisation fee granted through INESGA (see recital 26) confer an advantage on Siderúrgica Añón which is financed through state resources.

(79) The amounts of the aid measures mentioned in the previous point are the following: the grant provided by IGAPE: EUR 2 399 407; the subsidies granted by IGAPE on the loan granted by INESGA: 0,25 % per year on EUR 9 616 193 (interest subsidy), i.e. EUR 24 040,5 p.a., and 0,5 % on EUR 9 616 193 (formalisation fee), i.e. EUR 48 081 p.a.; the interest-free loan granted by the Ministry of Science and Technology: 5,7 % per year on EUR 1 803 036, i.e. EUR 102 773,5 p.a.

(e) *Distortion of competition and effect on trade*

(80) In view of the existence of competition and intra-Community trade in the sector (see recitals 20 to 23), the Commission considers that the abovementioned aid measures distort or threaten to distort competition and affect trade between Member States.

(81) The Commission concludes therefore that the grant provided by IGAPE, the interest-free loan granted by the Ministry of Science and Technology, the subsidisation by IGAPE of the interest and the loan formalisation fee granted through INESGA, the stake acquired by SODIGA in the share capital of Siderúrgica Añón and the guarantee granted by IGAPE constitute state aid within the meaning of Article 87(1) of the EC Treaty.

2. **Compatibility with the common market**

(82) The Commission firstly cannot accept the argument that some of the aid measures were granted under approved schemes (N 21/95 [26] and N 182/01 [27]). In the Decisions authorising those schemes the Commission took note of the Spanish authorities' commitment to respect the relevant rules for the steel sector. The Commission notes that the rules for the steel sector were contained in the Steel Aid Code, which excluded the steel sector from those schemes and imposed the prior notification obligation. Since this prior notification obligation has not been respected, the aid granted to Siderúrgica Añón is not covered by those two schemes.

(83) According to point 44 of the Commission communication concerning certain aspects of the treatment of competition cases resulting from the expiry of the ECSC Treaty, 'when taking decisions after 23 July 2002 in respect of state aid put into effect on or before that date without prior Commission approval, the Commission will proceed in accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful state aid' [28]. According to the last paragraph of this latter notice, the rules set out therein are nevertheless 'without prejudice to the interpretation of Council and Commission regulations in the field of state aid'.

(84) According to the second subparagraph of Article 9(2) [29] of Regulation (EC) No 70/2001, 'individual aid outside any scheme granted before the date of entry into force of this Regulation in the absence of a Commission authorisation and in breach of the notification requirement of Article 88(3) of the Treaty, shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt if it fulfils all the conditions of this Regulation, except the requirement in Article 3(1) that express reference be made to this Regulation'.

(85) The Commission considers that, in view of the figures on turnover, workforce or total balance sheet of Siderúrgica Añón and its linked enterprises (see recitals 15 and 17), it is a medium-sized enterprise (according to Annex 1 to the SME Regulation). It therefore has to be assessed whether any investment aid granted to Siderúrgica Añón fulfils the conditions of the SME Regulation.

(86) In this respect the Commission notes that, according to Article 6(1) of the SME Regulation, individual aid grants are not exempted from the prior notification obligation where one of the two thresholds mentioned under (a) and (b) are met.

[26] OJ C 298, 11.11.1995.
[27] OJ C 199, 14.7.2001, p. 11.
[28] OJ C 119, 22.5.2002, p. 22.
[29] Clerical error: should read 'Article 9a(2)'.

(87) It follows that the aid in the form of a grant of EUR 2 399 407 provided by IGAPE cannot be exempted. According to the Spanish authorities (see recital 24 above) the aid represents 8 % of the investment. The investment amounts therefore to EUR 29 992 588, which is higher than the EUR 25 000 000 threshold laid down in Article 6(1)(a). Furthermore, the steel industry has to be regarded as a sector which does not qualify for regional aid according to the third paragraph of point 1 of the Commission communication on rescue and restructuring aid and closure aid for the steel sector ([30]) and point 27 of the multisectoral framework on regional aid for large investment projects ([31]). The situation was the same at the time when the steel aid was granted under the Steel Aid Code. As Siderúrgica Añón is a medium-sized enterprise, the starting point for the applicable ceiling as referred to in Article 6(1)(a)(i) is indicated in Article 4(2)(b) as being 7,5 %. Pursuant to Article 6(1)(a)(i), the gross aid intensity may thus not exceed 50 % of 7,5 %, i.e. 3,75 %. 8 % is clearly above this threshold. The gross intensity of the IGAPE grant has indeed to take into account the full amount of the grant (which amounts to 8 %) and not what has been initially disbursed (which amounts to 0,95 %) as claimed by the Spanish authorities (see recital 37) because it is the amount granted and not the amount disbursed that has to be considered for the assessment of aid.

(88) As it also follows from the last sentence of point 27 of the multisectoral framework on regional aid for large investment projects that large individual aid grants in the steel sector not exempted under the SME Regulation are incompatible with the common market, the grant provided by IGAPE cannot be exempted under the SME Regulation. It should be stressed that the same conclusions would be reached if the Steel Aid Code in place at the time when the aid was granted were to be applied.

(89) All the other aid considered to be investment aid could not be exempted under the SME Regulation either. It would therefore have to be combined with the grant provided by IGAPE and would therefore be incompatible following the reasoning set out in recitals 86 to 88.

(90) Possible compatibility under the regional derogation for state aid has to be assessed in accordance with the substantive criteria set out in any instrument in force at the time when the aid was granted, in line with the Commission notice on the determination of the applicable rules for the assessment of unlawful state aid. As already mentioned, the Steel Aid Code did not authorise any regional aid at the time the aid was granted. Therefore, the aid cannot qualify for the regional derogation.

(91) The Commission cannot accept either the argument that some of the investments were eligible for environmental aid, for the following reasons:

(92) According to Article 3 of the Steel Aid Code ([32]), which sets out the criteria for the application of the environmental guidelines, the Commission must avoid general investment aid for new plants or equipment being granted under cover of environmental protection. Moreover, the environmental guidelines ([33]) applicable in accordance with the Steel Aid Code state that aid ostensibly intended for environmental protection measures, but which is in fact for general investment, is not covered by them (point 3.2.1).

(93) In the present case, the Commission notes, in the first place, that no environmental considerations were taken into account by the Spanish authorities when granting the aid.

(94) The Commission also notes that the investments in the water treatment system and in the reheating furnace will increase the efficiency of the company through a reduction in the costs of water or energy. The installation of these types of equipment is normal practice in the industry without being considered environmental investment. The Commission considers that this is the reason for carrying them out and that they are therefore not covered by the environmental guidelines ([34]).

(95) In any case, neither the Spanish authorities nor the recipient have provided any concrete evidence of the environmental benefits of those installations. There is therefore no need to make use of any independent expertise or to consult Member States (see the Annex to the Steel Aid Code). Nor have they deducted all the advantages in regard to lower costs of production, as the Annex ([35]) to the Steel Aid Code requires, or explained how the additional costs have been calculated.

([30]) OJ C 70, 19.3.2002, p. 21.
([31]) OJ C 70, 19.3.2002, p. 8.
([32]) This provision is applicable for the assessment of the aid granted, according to the Commission notice on the determination of the applicable rules for the assessment of unlawful state aid and points 82(b) and 7, second paragraph, of the Community guidelines on state aid for environmental protection.
([33]) Community guidelines on state aid for environmental protection.
([34]) See in particular the first sentence of the Annex to the Steel Aid Code.
([35]) See point (b) under 'Aid to encourage firms to contribute to significantly improved environmental protection' in the Annex.

(96) As for the investment in the civil works, the Commission considers that there is no environmental benefit and that, if there were benefits for the safety of workers, these would not be covered by the environmental guidelines or by any provision of the Steel Aid Code.

(97) The Commission cannot see either under which provision of the Steel Aid Code the aid could be deemed compatible. The aid is clearly not aid for research and development or closure aid and it was not granted in Greece. Furthermore, the Commission notes that the aid is not training aid within the meaning of Commission Regulation (EC) No 68/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to training aid ([36]) and not employment aid within the meaning of Commission Regulation (EC) No 2204/2002 of 12 December 2002 on the application of Articles 87 and 88 of the EC Treaty to state aid for employment ([37]), ([38]). In any event, the Spanish authorities did not rely on any of these derogations or regulations.

(98) Finally, the Commission notes that the Commission notice on state aid and risk capital was not applicable to the steel sector at the time the aid was granted and is still not applicable to this sector, according to the eighth paragraph of point VIII.3 thereof.

(99) In view of the foregoing, the Commission considers that none of the exceptions from the prohibition on investment aid to the steel sector is applicable in the present case and therefore that the measures identified by the Commission as constituting state aid are not compatible with the common market.

VI. **CONCLUSION**

(100) The Commission finds that Spain has unlawfully implemented the state aid measures in question, which are incompatible with the common market. These measures must therefore be discontinued.

(101) Moreover, according to Article 14(1) of Regulation (EC) No 659/1999, where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the recipient. The aid to be recovered shall include interest from the date on which it was at the disposal of the recipient until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid,

HAS ADOPTED THIS DECISION:

Article 1

1. The state aid which Spain has granted to Siderúrgica Añón SA is incompatible with the common market.

2. The aid referred to in paragraph 1 includes the following:

(a) the aid element involved in the stake acquired by SODIGA in the share capital of Siderúrgica Añón, which corresponds to:

(i) an annual premium of 5,13 % applied to the initial capital injection of EUR 1 803 060 reduced by the five annual repayments of EUR 150 916 in the case of the first stake, acquired in 2001, and

(ii) an annual premium of 3,86 % applied to the initial capital injection of EUR 495 180 reduced by the four annual repayments of EUR 41 868 in the case of the second stake, acquired in 2002;

(b) the grant awarded by IGAPE on 10 November 2000, amounting to EUR 2 399 407;

(c) the interest subsidies granted with respect to the syndicated loan of EUR 9 616 193 of 2 April 2001 via the 30 % guarantee, i.e. 0,3 % p.a., and the direct interest subsidy of 0,25 % p.a. provided by IGAPE, which in total amounts to EUR 52 889,1 p.a.;

(d) the payment of the formalisation fee of EUR 48 081 by IGAPE with respect to the loan of EUR 9 616 193 of 2 April 2001;

(e) the interest subsidy of 5,7 % p.a. contained in the interest-free loan of EUR 1 803 036 granted by the Ministry of Science and Technology on 29 December 2000.

([36]) OJ L 10, 13.1.2001, p. 20. Regulation as amended by Regulation (EC) No 363/2004 (OJ L 63, 28.2.2004, p. 20).
([37]) OJ L 337, 13.12.2002, p. 3.
([38]) In line with the last paragraph of the Commission notice on the determination of the applicable rules for the assessment of unlawful state aid, the Commission must check whether the aid could be compatible with any Commission or Council regulation currently in force in the state aid field.

Article 2

1. Spain shall refrain from any further grant of aid to the recipient via the measures referred to in Article 1.

With regard to payments already authorised but not made by the date of adoption of this Decision, Spain may require the reimbursement of all payments made after the date of adoption of this Decision or as of that date shall adjust the conditions of the measures listed in Article 1 to market conditions as referred to in this Decision.

2. Spain shall take all necessary measures to recover from the recipient the aid referred to in Article 1.

3. Recovery shall be effected without delay in accordance with the procedures under national law, provided these allow the immediate and effective implementation of this Decision. The sums to be recovered shall bear interest throughout the period running from the date on which they were first put at the disposal of the recipient until their actual recovery. The interest rate to be applied shall be the reference rate used for calculating the grant equivalent of regional aid.

The interest rate referred to in the first subparagraph shall be applied on a compound basis throughout the entire period referred to therein.

Article 3

Spain shall inform the Commission, within two months following notification of this Decision, of the measures planned and already taken to comply with it. It shall provide this information using the questionnaire attached in Annex to this Decision.

Article 4

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 16 June 2004.

For the Commission

Mario MONTI

Member of the Commission

ANNEX

Information regarding the implementation of the Commission Decision

1. CALCULATION OF THE AMOUNT TO BE RECOVERED

1.1. Please provide the following details regarding the amount of unlawful State aid that has been put at the disposal of the recipient:

Concise description of the measure (°)	Date(s) of payment (°°)	Amount of aid (*)	Currency	Date(s) of repayment (**)

(°) If the measure consists of several instalments and reimbursements, use separate rows.
(°°) Date or dates on which the aid or individual instalments of aid were put at the disposal of the recipient.
(*) Amount of aid put at the disposal of the recipient, in gross grant equivalent.
(**) Date or dates on which the recipient repaid the aid or individual instalments of aid.

Comments:

1.2. Please explain in detail how the interest payable on the amount to be recovered will be calculated.

2. RECOVERY MEASURES PLANNED OR ALREADY TAKEN

2.1. Please describe in detail what measures have been taken and what measures are planned to bring about the immediate and effective recovery of the aid. Where relevant, please indicate the legal basis for the measures taken or planned.

2.2. By what date will the recovery of the aid be completed?

3. RECOVERY ALREADY EFFECTED

3.1. Please provide the following details of aid that has been recovered from the recipient:

Concise description of the measure	Date(s) (°)	Amount of aid repaid	Currency	Date(s) of repayment (°°)

(°) Date or dates on which the aid or individual instalments of aid were put at the disposal of the recipient.
(°°) Date or dates on which the aid was repaid.

3.2. Please attach supporting documents for the repayments shown in the table at point 3.1.